

SERVED: June 26, 1992

NTSB Order No. EA-3596

**UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.**

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 3rd day of June, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration

Complainant,

v.

Docket

SE-9504

GERALD R. WESTHOFF,

Respondent.

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William E. Fowler, Jr., issued in this proceeding on February 27, 1990, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed an order of the Administrator suspending respondent's airline transport pilot certificate for 15 days on an allegation that he violated section 91.9 of the Federal

¹An excerpt from the hearing transcript containing the initial decision is attached.

Aviation Regulations ("FAR"), 14 C.F.R. Part 91.² The Administrator's order, which was filed as the complaint in this matter, alleged in pertinent part as follows:

2. On March 22, 1987, you [respondent] acted as pilot-in-command of Civil Aircraft N64339, a Boeing 727-231A, designated as Trans World Airlines (TWA) Flight 226, operating from Kansas City, Missouri to St. Louis, Missouri.

3. During powerback operations from Gate 35 at Kansas City International Airport, Kansas City, Missouri, the above-mentioned aircraft backed off the ramp and the left main gear became stuck in the mud.

4. You were unable to taxi the aircraft back onto the ramp. The engines were shut down, the passengers were deplaned, and the aircraft subsequently towed to the TWA maintenance facility.

5. By reason of the foregoing facts and circumstances, you operated an aircraft in a careless manner so as to endanger the lives and property of others in violation of Section 91.9 of the Federal Aviation Regulations.

Respondent asserts on appeal that the law judge erred in affirming the Administrator's order, as the Administrator failed to establish that respondent's operation resulted in even potential endangerment to the life or property of another.³ We agree. Upon consideration of the briefs of the

²FAR section 91.9 provided at the time of the incident as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³The Administrator has filed a brief in reply.

parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. For the reasons that follow, we will grant respondent's appeal.

The entire focus of the evidence presented by the Administrator was to show that respondent, and not the signalman, was at fault for this incident. The Administrator's percipient witnesses (the signalman, the wing walker, and their supervisor) testified that as respondent powerbacked from the gate, he failed to immediately respond to the signalman's signal to turn the aircraft, thereby causing the aircraft to leave the concrete ramp and enter a grassy area, resulting in the left main gear getting stuck in the mud. Respondent testified that he did follow the signals, but that the signal to turn came too late. He asserted that he was not careless in his operation of the aircraft. The law judge, while not making an explicit credibility finding, found that since the Administrator's witnesses "dovetail and corroborate each other," their testimony could not be rejected.⁴ Since this was a commercial aircraft with passengers on it, the law judge concluded, there was potential for endangerment caused by

⁴We will not determine whether the law judge's factual findings are supported by the record, since respondent has not appealed that finding.

respondent's failure to follow the signalman's signals. He thereupon affirmed the Administrator's order.

Notwithstanding the finding that respondent's carelessness caused *the* aircraft to leave the ramp, we are unable to uphold the law judge's finding of a violation of FAR section 91.9. In order to establish the violation, Board precedent is clear that it was incumbent on the Administrator to prove not only that respondent's operation was careless, but also that his carelessness created at least the potential for endangerment to persons or property. Haines v. DOT, 449 F. 2d 1073 (D.C. Cir.1971); Administrator v. Eger, 2 NTSB 862, 863 (1974). However, the present record is devoid of evidence demonstrating potential endangerment, and there is no argument that any actual injury or damage occurred. Certainly there was no evidence presented by the Administrator *to show* that the aircraft could have been damaged by the incidents. Indeed, the witnesses described it as "just barely rolling" off of the ramp; it "~~slipped over~~ the edge" (TR-81, 95, 119), and the gear "just dropped in" the mud (TR-105).⁶ Only respondent examined the aircraft

⁵Although the Administrator presented an FAA inspector who reviewed the file and expressed an expert opinion that respondent was careless in violation of the regulation, he failed to explain the basis for that opinion.

⁶All respondent felt was a "bump."

after the incident,⁷ and his unrebutted testimony was that the gear was not stuck, but that the edge of the concrete acted like a chock against the wheel. According to his unrebutted testimony, only the bottom one to two inches of the tire tread had any dirt on it. The only reason the aircraft had to be deplaned and towed, respondent testified, was to avoid any possibility that other aircraft on the active runway could be damaged by his aircraft's jet exhaust, if he had applied sufficient forward thrust in an attempt to return the aircraft to the taxiway.

Moreover, our review--of the record fails to reveal any evidence that the operation could have damaged other aircraft parked at nearby gates, or that respondent's aircraft could have damaged or been damaged by ground equipment in the ramp area. Again, the Administrator's own witnesses testified that before the powerback operation was initiated, they had insured that other aircraft and ground equipment were well clear of respondent's aircraft. (TR-75).

Finally, we do not agree with the law judge's conclusion that potential endangerment was established merely because this was a passenger-carrying flight. The likelihood that the passengers, who were already seated and belted-in for take off, could have been injured during a powerback

⁷None of the Administrator's witnesses examined the aircraft after it went off the ramp because they all hurried into TWA'S offices so they could immediately file an incident report.

operation simply because the left main gear of the aircraft had slowly rolled off of the edge of the ramp is far from self-evident, and, we think, absent any evidence on the matter, too remote to support a finding of a violation of FAR section 91.9. In any event, we need not speculate as to What could have happened to the aircraft or its passengers under the circumstances presented. The burden was on the Administrator to establish that there was some likelihood of injury or damage by the introduction of substantial, reliable, and probative evidence. The Administrator failed to meet that burden here.

ACCCORDINGLY , IT IS ORDERED THAT:

1. Respondent's appeal is granted; and
2. The initial decision is reversed and the Administrator's order suspending respondent's ATP certificate is dismissed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in above opinion and order.